

PHILIP MORRIS COMPANIES INC.

INTER-OFFICE CORRESPONDENCE

120 PARK AVENUE, NEW YORK, N.Y. 10017

To: Board of Directors

Date: October 21, 1991

From: Murray H. Bring *MH*

Subject: Cipollone

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File:
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Mike is traveling and cannot write to you himself, but he has asked me to advise you of a development that occurred today in the Cipollone case.

The Supreme Court today issued an order indicating that the Cipollone case will be set for reargument later this Term. While the order did not specify the date of reargument, it will probably occur in December or January.

It is always difficult to determine from an order of this type what the basis for it is. One can speculate about several possibilities, including the following:

1. In its initial vote, the Court may have split 4-4, and has, therefore, set the case for reargument so that Justice Thomas, who was not present at the original argument, can participate and break the tie.
2. In its initial vote, there may have been a majority of Justices to decide certain issues (e.g., whether claims based on a failure to warn are preempted), but the Court may have split 4 to 4 on other issues (e.g. whether claims based on intentional misrepresentation are preempted). Under such a circumstance, it is not unusual for the case to be reargued, so that the entire Court can participate and thereby avoid a tie vote on any issue.
3. The case presents a number of complex issues involving statutory interpretation. It may be that, after the argument, one or more Justices were not sure how they would vote, and they may have abstained in the initial vote on all or some of these issues. Under these circumstances, a reargument would normally be scheduled when only eight Justices heard the original argument. That would permit the uncertain Justices to have further opportunity to consider their positions and to seek clarification from the parties during the reargument on any matters about which they may be confused. This course also eliminates the risk that, after much effort has been expended in preparing and circulating draft opinions, the uncertain Justices will end up casting their votes in such a way as to result in a tie vote, which would necessitate setting the case for reargument at that time. In short, by scheduling the reargument now, the Court avoids what might be a time-consuming and inconclusive exercise.

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The only downside that I see from today's order is that it will give plaintiff's lawyer, Marc Edell, an opportunity to improve upon his argument, which was not very effective the first time.

Finally, this delay means that the Court's decision is not likely to be rendered until the latter part of the Term, which runs from late April through the end of June.

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